

STATE OF CALIFORNIA
STOCKDALE DEVELOPMENT CORP.

IBLA 73-375

Decided October 28, 1980

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting swamplands grant application S 4420.

Reversed and remanded.

1. Evidence: Burden of Proof -- Rules of Practice: Appeals: Burden of Proof -- Swamplands

The burden of proof as to the character of land applied for under the Swamp Land Acts falls upon the applicant.

2. Swamplands

Where an 1855 Federal survey and plat suggests that certain lands may have been swamp and overflowed and appellants present substantial additional documentation revealing a long term consistent characterization of the land as swamp and overflowed, this Board will make a finding of fact that the lands were swamp and overflowed within the meaning of the Swamp Land Acts.

APPEARANCES: Dennis M. Eagan, Deputy Attorney General, California State Lands Commission, for the State of California, and Edward S. Merrill, Esq., McCutchen, Doyle, Brown & Emerson, San Francisco, California, for Stockdale Development Corporation.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State Lands Commission for the State of California and Stockdale Development Corporation (Stockdale) have appealed the decision of the California State Office, Bureau of Land Management (BLM),

rejecting swamp and overflowed land grant application S 4420 for all swamp and overflowed land lying within the E 1/2 SE 1/2 sec. 34 and S 1/2 and S 1/2 N 1/2 sec. 35, T. 28 S., R. 28 E., Mount Diablo meridian. BLM rejected the application after finding that the record did not support a conclusion that the described lands were swamp and overflowed lands in 1850.

The State submitted application S 4420 pursuant to the Act of September 28, 1850, 9 Stat. 519 (43 U.S.C. §§ 982-84 (1976)) and section 4 of the Act of July 23, 1866, 14 Stat. 218 (43 U.S.C. § 987 (1976)). The Act of September 28, 1850, supra, granted to states, then a part of the United States, all of the swamp and overflowed lands within their boundaries and unsold on the date of passage of the Act for the purpose of constructing levees and drains necessary for reclamation of the lands. The Secretary of the Interior was required to make an accurate list and plats of such lands, transmit the lists to the Governor of each state, and, upon request of a Governor, issue patents for the identified lands. Soon after passage of the Act, the question arose as to when the grant took effect in each state: on the date of the Act or the date of issuance of a patent to a state. The question was settled by the Supreme Court which, after examining numerous Departmental and state court decisions, held that the Act granted swamp and overflowed lands in praesenti, passing title to the lands from the date of the Act, and required identification of the lands only to perfect title. Wright v. Roseberry, 121 U.S. 488 (1887) and cases cited therein. See also 43 CFR 2625.0-3(b).

Difficulties in identifying and certifying the character of the lands in each state in many cases delayed patenting of the lands under the Act. As a result, many state legislatures undertook to identify and dispose of swamp and overflowed lands themselves which gave rise to conflicting claims to the lands. The problem was especially great in the State of California because of the large immigration to that State beginning in 1850. Thus, as early as 1855 the California legislature provided for State survey and sale of lands. To resolve the numerous title disputes that arose because of the State's actions, the United States Congress passed "an Act to quiet Land Titles in California," 14 Stat. 218 (July 23, 1866), which, among other matters, changed the provisions of the 1850 Act as to the identification of swamp and overflowed lands in California. Section 4 of the 1866 Act provided:

That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of

such township plats. The commissioner shall direct the United States surveyor-general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the general land office for approval: Provided, That in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such State surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the commissioner shall direct the surveyor-general to make segregation surveys, upon application to said surveyor-general by the governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the general land office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony, to be taken before the surveyor-general, who shall decide the same, subject to the approval of the commissioner of the general land office.

(For the codified version see 43 U.S.C. § 987 (1976).) Under this provision, title to swamp and overflowed lands vested upon approval of the township plat, whether prior to 1866 or after, rather than the subsequent date of certification by the land commissioner. Tubbs v. Wilhoit, 138 U.S. 134 (1891). See also Wright v. Roseberry, supra.

In rejecting the State's swamp and overflowed lands application, BLM relied on a report of the Chief of the Division of Cadastral Survey. The decision notes that the Federal Government surveyed the lands at issue in 1854-1855 and compiled a plat from the field notes which the California Surveyor General approved on September 4, 1855. It continues, "Notwithstanding that the State might have proceeded on the basis that the lands in question were overflowed lands under the granting Act and the [U.S. Land Office] Register in 1878 so interpreted the plat, the evidence is clearly to the effect that the lands were not those of the character it was intended should pass to the States under the Swamp Land Grant." BLM reached this conclusion in part by examining the field notes of the 1854-1855 survey which indicate that "meander posts were set 'on edge of low bottom lands,' or

'on the left bank of Kern River on edge of overflowed land.'" The decision explains further:

The depth of the overflow is given variously as "8 or 10," "10" or "10 or 12" feet. At this point, the Kern River is emerging from the mountains, is confined between abrupt slopes, and the meander corners are set on the edge of the bed. The actual water channel at various times undoubtedly moved back and forth across the bed after floods. The bed of a river, or its flood plain that is subject to inundations only by flash floods, cannot be said to be overflowed land within the meaning of the Swampland Act. Such expressions in the field notes as "edge of overflowed land" have been advanced as qualifying the land as "swamp and overflowed." The actual evidence is that these expressions have nothing to do with a determination of swamp and overflowed character of the land.

BLM asserts that the status of the land at issue must stand on the best evidence of its condition in 1850. For this reason, BLM did not address the State swampland surveys and patents submitted with the State's application "as they are dated after and do not come within any savings provisions of the Act of July 23, 1866."

However, BLM does address the 1878 statement of the United States Land Office Register, J. D. Hyde, where he certifies that the official township plat shows "that there is a line of 'swamp and overflowed' land on each side of the Kern River in secs. 34, 35, and 36 in said Township." BLM characterizes this statement as the "only indication that the subject lands were considered 'swamp and overflowed,'" and then states that "[t]he basis of this statement is unsupported and as such is not dispositive of the matter."

BLM further refutes the swamp characterization of the lands by stating that the "marsh grass" symbol shown on the 1855 plat is not conclusive because it is not clear that whoever added the symbol to the plat intended it to represent swamp or overflowed land. BLM notes that the 1855 Survey Manual shows the symbol as possibly representing "high rolling prairie," "prairie," or "wet prairie" in addition to swamp, and that the words "unfit for cultivation" were not used in the survey field notes as required by the 1855 Manual. BLM admits, however, that it is uncertain whether or not a copy of the 1855 Manual had reached California before the survey in question and recognizes that the 1851 Manual did not address swampland grants.

Finally, BLM notes that the Chief of the Division of Cadastral Survey has cautioned that in accepting a plat, no action should be taken that would impair bona fide rights of other claimants, entrymen, or owners of land in the vicinity.

In their statement of reasons, appellants make three general arguments. First, they contend that the lands at issue were shown as swamp and overflowed on the 1855 township plat, as supplemented by field notes, and, therefore, the lands were confirmed to the State of California by the Act of July 23, 1866, supra. In support of this argument appellants assert the following:

1. The reference in the 1866 Act to the approved plat includes the plat, field notes and all special notations.
2. The marsh grass symbol used on the September 4, 1855 plat was the conventional symbol used to designate swamp and overflowed land.
3. The field notes of Township 28 S. Range 28 E. indicate the meander was of the overflowed lands rather than the bank of the river.
4. The plat and notes were interpreted by the local land office in 1878 as designating the land in question swamp and overflowed land.
5. The plats and field notes of other townships, which were determined by the Department of the Interior or the courts to designate swamp and overflowed lands have descriptions less clear than those of the land in question.

Second, appellants argue that the Department of the Interior has repeatedly made determinations which reflect that the lands at issue were swamp and overflowed lands. They claim that:

1. Two indemnity selections for lost school lands in Section 36 demonstrate that the land in question was swamp and overflowed.
2. The 1878 certificates [signed by J. D. Hyde] were a determination by the local land office that the land was swamp and overflowed.
3. The 1891 Patent of Section 35 to the Southern Pacific Railroad, which excepted the overflowed lands, is a determination of the swamp and overflowed character of the land in question.
4. The Bureau of Land Management's decision in 1972 voiding two placer mining claims in Sections 34, 35 and 36 because the land had passed to the State as swamp and

overflowed under the Arkansas Act, is determinative of the central factual issue of this appeal and bars reconsideration of the issue under the principles of res judicata and collateral estoppel.

5. The Department of the Interior is estopped from denying Stockdale's assertion that the land in question is swamp and overflowed. [1/]

Third, appellants argue that the lands at issue were in fact swamp and overflowed lands within the meaning of the Act of September 28, 1850, supra. As support they contend that:

1. The patent by the State of California of the land in question as swamp and overflowed is prima facie evidence of its character.

2. The land in question was shown as swamp and overflowed land on the official township plat and the field notes.

3. The March and May 1878 Certificates of J. D. Hyde, Register, confirm the swamp and overflowed character of the land.

4. The State surveys of the land clearly showed it to be swamp and overflowed.

5. The 1886 topographical and irrigation map of the San Joaquin Valley shows the land in question as swamp and overflowed land.

6. The State school indemnity selections for land in Section 36 are further evidence of its swamp and overflowed character.

7. The decision of the BLM contained no evidence that the land in question was anything but swamp and overflowed land.

Appellants also add that the rights of adjacent landowners have been fixed and approval of their swamp and overflowed segregation plat will not prejudice those rights.

The history of the lands at issue has been extensively set out by appellants in their statement of reasons and exhibits. In brief,

1/ The State does not join in the argument that the Department of the Interior is estopped from denying that the lands were swamp and overflowed.

T. 28 S., R. 28 E., Mount Diablo meridian, was surveyed under contract of the U.S. Surveyor General's Office in 1854 and 1855. A township plat was constructed based on the survey field notes and approved by the Surveyor General for California on September 4, 1855 (Exhs. 1 and 2). In 1873 the Kern County surveyor surveyed the lands at issue and reported them to be swamp and overflowed lands after certified notice from one E. D. Payne that he desired to buy the lands under the law providing for the sale of swamp and overflowed lands (Exhs. 3 and 4). Such a sale apparently never occurred, because in March 1878, a Mr. P. T. Colby filed application with the State for location of all swamp and overflowed land in secs. 34, 35, and 36 of the township. The State Surveyor General approved this location in August 1878 (Exh. 5). Also in March 1878, J. D. Hyde, Register of the U.S. Land Office in Visalia, California, certified that there were "no Preemption or Homestead filings on the Swamp and Overflowed land in Sections number 34. 35. and 36. in Township 28 South Range 28 East, Mount Diablo Base and Meridian" (Exh. 6). Colby later released his claim to sec. 36 and received a California Certificate of Purchase dated September 27, 1878, for all the swamp and overflowed lands in secs. 34 and 35 (Exh. 8). On March 8, 1880, Colby assigned all of his interest in these lands to James B. Haggin (Exh. 9) and the State issued a patent for the swamp and overflowed lands in secs. 34 and 35 to Haggin on December 27, 1895. (Exh. 10). The patent then passed to Stockdale's predecessor in interest. (Appellant's Statement of Reasons 4.) Stockdale acquired the lands in 1969.

BLM records also reflect that Kern River Oil Company Consolidated located two placer mining claims on the lands at issue on November 15, 1900 (as amended March 8, 1901).

The present case arose when Stockdale applied to a title insurance company for a subdivision title insurance guarantee. The company found that there was no United States patent on record passing title to the lands to the State of California. Stockdale requested that the State take steps to perfect title to the lands which had passed under the 1895 State patent. On March 4, 1971, the State requested that BLM provide a segregation plat of the swamp and overflowed lands in secs. 34 and 35 preparatory to a Federal patent.

On January 19, 1972, BLM declared the Kern River Oil Company Consolidated placer mining claims null and void because:

The official records of the Bureau of Land Management reflect that the official township plat of survey for T. 28 S., R. 28 E., M.D.M., was approved September 4, 1855 and the field notes therefor reflect that the lands embraced within the claims in secs. 34, 35, and 36 were shown at the time of the Swamp Land Grant Act (September 28, 1850, supplemented by the Act of July 23, 1866) to be swamp or overflow land within the meaning of

the Act. Such lands otherwise being vacant and unappropriated on September 28, 1850 passed to the State of California.

* * * * *

The lands at issue were therefore not public lands on the dates of attempted locations of the Kern River Consolidated Placers Nos. 1 and 2 mining claims.

The Department of the Interior has consistently held that the title to swamp and overflow lands is vested in the State within whose boundaries they are situated. The term "public land" when used in Federal provisions of the law relating to the disposition of land does not include land to which title has passed to a State.

Then on April 20, 1973, BLM rejected the State's application for a swamp and overflowed land segregation plat for the reason that the same land was not swamp and overflowed in 1850 and thus did not pass to the State of California under the Act of September 28, 1850, supra.

[1] The burden of proof on the issue of the swamp or overflowed character of land is on the swamplands grant applicant. Virgil Lopez, 21 IBLA 33 (1975); State of California, 8 IBLA 164, 165 (1972); State of Iowa v. Chicago, Milwaukee & St. Paul Ry. Co., 30 L.D. 120 (1900). Keeping this in mind, we turn to an examination of the means provided by section 4 of the Act of July 23, 1866, supra, for identifying state lands as swamp and overflowed.

[2] The first clause of section 4 provides for the certification of swamp and overflowed lands to the State of California where the lands have been so characterized on approved plats based on Federal surveys. The Supreme Court examined this provision in Tubbs v. Wilhoit, supra, and confirmed that title to swamp and overflowed lands is vested in the State by the 1866 Act simply by identification of land as swamp and overflowed on such plats. The Court found that once the Surveyor General approved the township plat, the duty of the Commissioner of the General Land Office to certify the lands represented as swamp and overflowed to the State is "purely ministerial" and failure to so certify cannot defeat title to the State. 138 U.S. at 146.

The Supreme Court elaborated on the Tubbs holding in Heath v. Wallace, 138 U.S. 573, 579-80 (1891), as follows:

[Section 4] of the statute established rules or methods for the identification of swamp and overflowed lands in California which superseded all previous rules or methods for that purpose. The several rules or methods provided

for were intended to meet any emergency that might arise, and thus give to the State all the swamp and overflowed lands within her limits. The method provided in the first clause was but one of several specified in the section. But one thing was required to be shown under this clause -- only one kind of evidence as to the character of the lands was necessary -- in order to give to the State the right to demand the certification of them over to her as swamp and overflowed lands; and that evidence the United States furnished in the plat of the survey of the township in which the lands were situated. An inspection of the township plat would show whether or not any lands in the township were returned as swamp and overflowed. If they were, that designation was sufficient and conclusive evidence, under the first clause of section 4 of the act, to establish the title of the State to them. But as that particular designation was but one of several methods of identification prescribed by the act, it should not be unnecessarily extended beyond its plain and obvious import. For if lands which, in fact, were swamp and overflowed, were not so designated on the approved plat of the township, the State was not precluded from claiming them as swamp and overflowed, and having them identified by one of the other methods provided by the act. She still had recourse to the methods of identification provided by the second and fourth clauses of the section, and if the lands were in fact swamp could not fail to get them. On the other hand, the United States were bound by the action of the surveyor if he noted on his survey that the lands were swamp and overflowed, and that survey was approved. We think, therefore, that while the act of July 23, 1866, may be called remedial in its character, yet the particular clause of the statute, operating as it does in the nature of an estoppel against the grantor and not so against the grantee, should not be construed as embracing more than its terms will fairly warrant. In other words, this designation, operating as an estoppel against the United States, should have a strict construction. No lands should be considered as embraced within the terms "swamp and overflowed" by mere implication, simply because they may have been described in other terms which, in some instances, might be equivalent to the terms prescribed by the act. If, in any instance, terms claimed to be equivalent to those prescribed by the first clause of the fourth section of the act of 1866 can be shown by evidence to have reference to lands not contemplated by the swamp land grant, as enuring to the State under that grant, then such terms cannot be considered as equivalent to the terms "swamp and overflowed."

See also State of California (On Review), 23 L.D. 230 (1896).

As the above quotation reflects, the absence of a designation of swamp and overflowed lands on an approved plat is not conclusive of the character of the land. Under the second clause of section 4, the lands may be certified to the State on the basis of State segregation surveys made in conformity with the Federal system of surveys or, that failing, the State may provide independent testimony of the character of desired lands under clause 4.

We turn first to the township plat for T. 28 S., R. 28 E., Mount Diablo meridian, approved in 1855 by the Surveyor General. The plat shows the Kern River flowing through secs. 34-36. On either side of the river within the meander points the area is colored a faded green and reflects small markings commonly known as marsh grass symbols. Estimates of acreage noted on the plat for each 16th of a section on either side of the river exclude those lands within the meander points. The words "swamp and overflowed lands" do not appear on the plat. There is no color code nor symbol identification.

Field notes made during a Federal survey are the official record of the survey and must be considered when examining the township plat to which they relate. Heath v. Wallace, *supra* at 583, Cragan v. Powell, 128 U.S. 691, 696 (1888). In the field notes for the survey of secs. 34 and 35, the surveyor indicated that he set meander points both "on the Edge of overflowed land" and "on Edge of low bottom land subject to overflow." Close examination of the plat and notes reveals that the surveyor apparently made a distinction in using the two phrases because the former describes points on the left or south-southeast side of the Kern River and the latter describes points on the opposite side of the river.

In its decision, BLM stated that the marsh grass symbol on the plat is not conclusive of the character of the land because there is no evidence that the surveyor intended the symbol to indicate swamp and overflowed lands. BLM points out that the 1855 Survey Manual shows the symbol as identifying other types of land as well as swampland and also that the 1855 Manual requires the designation "unfit for cultivation" for swampland.

Appellants claim, on the other hand, that the marsh grass symbol was the conventional symbol used to designate swamp and overflowed land and cite several Departmental decisions reflecting that fact. In State of California (On Review), *supra* at 232, the Secretary of the Interior stated that:

[T]he return of the surveyor-general must clearly show the land to be of the character contemplated by the granting act. The designation must be clear and explicit and nothing is to be placed thereunder by implication. Heath v. Wallace, *supra*.

On these plats the mark used to indicate swamp lands is found in the body of the plat, * * *.

Appellants have provided the Board with the plats to T. 22 S., R. 22 E., and T. 23 S., R. 21 E. referenced in this decision at Exhs. 13 and 14. We agree that the "mark used to indicate swamplands" is the same as that used on the 1855 plat of T. 28 S., R. 28 E., Mount Diablo meridian. We must also point out that these townships were surveyed in 1884 and reflect a notation in the margin as to the acreage of the "Area of swamp and overflowed lands unfit for cultivation."

In Davis v. State of California, 13 L.D. 129 (1891), the Secretary of the Interior states that the lands in dispute were "represented on said approved plat as swamp land." The appropriate plat, provided by appellant at Exh. 15, again shows use of the same symbol. This plat was approved in 1883 and also contains a notation as to the acreage of the "Area of Swamp and Overflowed Land unfit for cultivation."

Finally, appellants refer us to correspondence dated April 17, 1934, in which the Assistant Commissioner of the General Land Office refers to "a part of the NE Sec. 17 and of the W-1/2 Sec. 16, T. 6 S., R. 9 E., M.D.M., indicated by the conventional sign as swamp and overflowed land on the township plat approved January 31, 1853." (See Exh. 16.) The 1853 plat shows the same marsh grass symbol in the described areas as well as other areas. In this case, no notation regarding swamp and overflowed lands is evident.

While we believe that the above represents significant evidence that use of the marsh grass symbol on the 1855 plat was intended to reflect swamp and overflowed lands, we do not find the symbol conclusive because there are no identifying labels. At the same time, we conclude that the failure of the plat to conform to the requirements set out in the 1855 Manual is of little consequence. The survey in question was done in 1854-55 and we believe it unlikely, therefore, that the surveyors were guided by the 1855 version of the manual. Since there is no evidence as to what guidance the surveyors followed in this case, the plat is inconclusive as to the character of the land marked by the symbol.

BLM's comments on the field notes have been set out previously in this opinion. In response, appellants argue that the field notes show that the meander points were not set on the edge of the riverbed as BLM suggests but rather the surveyor set them at the edge of overflowed land. Appellants also refer us to a U.S. Geological Survey map which contradicts BLM's characterization of the Kern River as "confined between abrupt slopes" in the areas at issue. (Exh. 30).

We agree with appellants that the field notes reveal an intentional distinction between points on the edge of the riverbed and the meander points. The problem, however, is not in the distinction

between the edge of the riverbed and the meander lines, but it is in the interpretation of the language used by the surveyor. We refer to the statement previously quoted from Heath v. Wallace, supra, wherein the Supreme Court said, "No lands should be considered as embraced within the terms 'swamp and overflowed' by mere implication, simply because they may have been described in other terms which, in some instances, might be equivalent to the terms prescribed by the act." The Court went on to discuss similar terms as follows:

Now, lands "subject to overflow," or "subject to overflow from slough," or "subject to periodical overflow," are not necessarily such as come within the descriptive terms of those enuring to the State under the swamp land grant. Whether the terms "swamp" and "overflowed" when connected by the particle "and" be taken together as a general term of description for the lands granted by the swamp land act, or whether those terms are separable and refer to two different qualities of lands thus granted, makes little or no difference in this consideration. If the former theory be the correct one, then manifestly the meaning of the phrase is entirely different from the phrase "subject to periodical overflow." And if the latter theory be adopted, still we think there is a marked distinction between the terms "overflowed" and "subject to periodical overflow." The term "overflowed" as thus used, has reference to a permanent condition of the lands to which it is applied. It has reference to those lands which are overflowed and will remain so without reclamation or drainage; while "subject to periodical overflow" has reference to a condition which may or may not exist, and which when it does exist is of a temporary character. It was never intended that all public lands which perchance might be temporarily overflowed at the time of freshets and high waters, but which, for the greater portion of the year, were dry lands, should be granted to the several States as "swamp and overflowed" lands.

138 U.S. at 584-85. Examining the field notes in light of the above discussion, we conclude that the field notes at best merely suggest that the lands on the south-southeast side of the Kern River may have been "overflowed" because of the use of that term. The designation "subject to overflow," while not necessarily the same as "subject to periodic overflow," can not be equated with "swamp and overflowed" as used by the swamplands acts. On the whole, we find that the possible swamp and overflowed character of the lands at issue, though suggested, is not shown conclusively by the survey and plat. Thus, we must examine appellants' evidence in the context of the other means of identifying the lands as swamp and overflowed.

Appellants have not submitted State segregation surveys of T. 28 S., R. 28 E., Mount Diablo meridian, and therefore, the remedy described in clause 2 of section 4 of the 1866 Act is not available in this case. 2/

Thus, we turn to the other evidence provided by appellants purporting to establish the swamp and overflowed character of the lands in question. Appellants have extensively briefed the issue, presenting to us official State surveys and documents identifying the land as swamp and overflowed as well as other Federal documentation indicating that the lands were swamp and overflowed. 3/ While all of this evidence postdates the 1850 Swamplands Act, it reveals a consistent characterization by both Federal and State authorities of the land as swamp and overflowed.

The rationale put forth in the BLM decision for ruling that the lands were not swamp and overflowed is unconvincing in light of the evidence presented by appellants. BLM dismisses documentary evidence, considered relevant under the law to the issue at hand, by unexplained statements that such evidence is "unsupported," "not dispositive," or has "nothing to do with a determination of swamp and overflowed character." Moreover, BLM's action, initiated as a result of the State application, declaring two mining locations void because the lands were swamp and overflowed and its subsequent rejection of the State application because the same lands were not swamp and overflowed, seems to conflict with its present rationale.

We agree with appellants that the certification in 1878 by J.D. Hyde, the General Land Office Register, should be accorded great weight rather than summarily disregarded as done by BLM. The

2/ Appellants did present various State-approved county surveys reflecting swamp and overflowed lands in secs. 34 and 35 which were made in response to an application to purchase the lands. Although the plats appear to conform to the Federal survey system, such surveys are not considered "segregation surveys" within the meaning of the Act of July 23, 1866, supra, Heath v. Wallace, 138 U.S. 573 (1891), and, therefore, may not be used as a basis for certifying to the State lands designated swamp and overflowed on such surveys.

3/ These materials include:

A land selection list of the Southern Pacific Railroad, dated March 20, 1886, requesting all lands in sec. 35, T. 28 S., R. 28 E., Mount Diablo meridian, and the subsequently issued United States patent limiting the selection in sec. 35 to lands outside "the overflow of Kern River section thirty-five" (Exh. 28).

School lands indemnity selection documents, dated variously from 1870-1884, identifying lands in sec. 36 of T. 28 S., R. 28 E., Mount Diablo meridian, as swamp and overflowed (Exhs. 23-26).

An 1886 State topographical and irrigation map of the area showing the lands at issue as swamplands (Exh. 29).

March 29, 1878, certification refers to the "Swamp and Overflowed land in Sections number 34, 35. and 36. in Township 28 South Range 28 East, Mount Diablo Base and Meridian." On the bottom of this document is the following notation:

S & OL & River

sec. 36 = 139.18 acres
 sec. 35 = 127.04 "
 sec. 34 = 28.71 "
 294-93

If we assume that each quarter section is 160 acres as the surveyor appears to have done, and subtract the acreage for the public lands as noted on the approved 1855 plat from the total acreage for each section, we arrive at a figure of 28.91 uncounted acres in sec. 34 and exactly 127.04 acres in sec. 35. As we noted previously, the May 23, 1878, Hyde certification refers specifically to the fact that there is a "line of 'swamp and overflowed' land, on each side of Kern river" indicated on the official plat for T. 28 S., R. 28 E., Mount Diablo meridian, on file in his office. We agree with appellants that Register Hyde's relatively contemporaneous interpretation should carry greater weight than that of officials of the Department almost 100 years later. See Heath v. Wallace, supra at 580. Cf. Dolores Olsen, 45 IBLA 232 (1980).

After a thorough review of the BLM decision, case record, and appellants' evidence and arguments, we conclude that appellants have met their burden of establishing the character of the lands in T. 28 S., R. 28 E., Mount Diablo meridian.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded for issuance of the appropriate patent to the State.

 James L. Burski
 Administrative Judge

We concur:

 Anne Poindexter Lewis
 Administrative Judge

 Douglas E. Henriques
 Administrative Judge

